(2) 89-1157

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

Norma Lynch, as successor personal representative of the estate of Dexter M. Evans, Jr., M.D., and Aetna Casualty and Surety Company,

Petitioners,

vs.

Arthur Fleming, as guardian ad litem for Dedrick Fleming, an incompetent person,

Respondent.

ON WRIT OF CERTIORARI TO THE
SOUTH CAROLINA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the South Carolina Supreme Court properly rule that reopening the subject estate for subsequent administration of a liability insurance policy would not violate any equal protection rights of the estate of the insured tortfeasor or the liability insurance carrier?

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JURISDICTION

Respondent does not question the Court's jurisdiction with respect to certiorari review under 28 U.S.C. §1257 (3), but would note that Petitioner has apparently not complied with Supreme Court Rule 29.4(c).

ARGUMENT

The South Carolina Supreme Court properly ruled that reopening the subject estate for subsequent administration of a liability insurance policy would not violate any equal protection rights of the estate of the insured tortfeasor or the liability insurance carrier.

This is a brain damaged baby case involving claims of negligence against a physician who is now deceased. Respondent Arthur Fleming alleges that Dr. Dexter M. Evans, Jr. negligently mismanaged his wife's labor and delivery, thereby causing his son to sustain catastrophic brain injuries. Dr. Evans had professional liability insurance in effect at the time through Aetna Casualty and Surety Company (hereinafter, "Aetna") with limits of $1.1 million, which covers the claim. However, before suit was brought on the claim, Dr. Evans died; the tangible

assets of his estate were distributed; and his estate was closed.

In the case of Moultis vs. Degen, 279 SC 1, 301 S.E.2d 554 (1983), the South Carolina Supreme Court ruled that tort claimants were "creditors" subject to the bar of the South Carolina nonclaims statute then in existence. The Moultis court expressly observed that closed estates may be reopened at the request of an interested party where there exist undistributed assets or after-discovered assets, which would be exempt from the bar of the nonclaims statute. A liability insurance policy covering harm caused by negligent acts of the decedent is such an undistributed asset, which constitutes an exception from the non-claims statute and can justify the reopening of an estate for subsequent administration. Moultis vs. Degen, supra.; In re: Miles Estate, 262 NC 267, 138 S.E.2d 487 (1964).

It has thus been expressly recognized by the South Carolina Supreme Court since 1983 that a tort claimant, or someone acting on his behalf, may reopen an estate so that a tort action may be pursued and judgment, if obtained, satisfied by the decedent's insurance policy. Id. Essentially the same procedure[1] was codified as statutory law in 1987 by the revised South Carolina Probate Code. See Sections 62-3-803 and 62-3-1008, Code of Laws of South Carolina, 1976, as amended. The procedure followed by Respondent Arthur Fleming in this case complies with the procedure sanctioned by the Moultis case and by the South Carolina

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[1] While the procedure was essentially the same, the statute differed from Moultis in terms of the tort claim exceptions to the bar of the nonclaims statute. Whereas, Moultis recognized an exception with respect to any undistributed or after-discovered asset, including but not limited to liability insurance coverage, the statute's only tort claim exception is where liability insurance was available to cover the claim.

Probate Code.

The sole basis Petitioners raise for challenging the reopening of the estate is their assertion that South Carolina Code §62-3-803(c)(2) violates the equal protection rights of the estate and its liability carrier. The nonclaims statute provides that all tort claims against the estate of a deceased tortfeasor are barred if not presented within eight months after publication of notice to creditors, except to the extent there exists liability insurance coverage. Petitioners claim the liability insurance exception of §62-3-803(c)(2) denies them equal protection of the law because it subjects them to liability not imposed upon an estate without liability insurance.

The standard for judicial review of Petitioners' equal protection challenge is the rational basis test, since the

challenged statute is a matter of economic or social regulation and involves no fundamental rights or suspect classes. In an equal protection review, great deference is accorded a legislative classification.

> Social and economic legislation ... that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose; such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality, and such legislation is valid unless the varying treatment of different groups or persons is so unrelated to the achievement of any combinations of legislative purposes that a court can only conclude that the legislature's actions were irrational.
> Hodel vs. Indiana, 452 U.S. 314 (1981).

> Although the rational basis standard is not a toothless one, it does not allow the United States Supreme Court, for purposes of determining whether the requirements of equal protection have been complied with, to substitute the courts'

> notions of good public policy for those of the [legislative branch]; as long as the classificatory scheme chosen by [the legislative branch] rationally advances a reasonable and identifiable governmental objective, the court must disregard the existence of other methods of providing equal protection, that, perhaps, the court would have preferred. Schweiker vs. Wilson, 450 U.S. 221 (1981).

The equal protection clause of the Fourteenth Amendment gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. Ohio Bureau of Employment Services vs. Hodory, 431 U.S. 471 (1977). In reviewing the constitutionality under the equal protection clause of the Fourteenth Amendment of a statutory classification, it is not the function of a court to hypothesize independently on the desirability or feasibility of any possible alternatives to statutory scheme as

formulated. Caban vs. Mohammed, 441 U.S. 380 (1979). The classification at issue here is deceased tortfeasors with liability coverage at the time the alleged tort was committed. This classification is reasonably related to the legitimate legislative purpose of allowing the claims of injured parties asserted within the statute of limitations while protecting tangible assets of the tortfeasor's estate which are subject to prior administration and distribution.

Two legitimate legislative purposes come into play in the context of excepting from the general nonclaims statute claims against estates for which liability insurance exists: (1) allowing the claims of injured parties asserted within the statute of limitations and (2) providing orderliness and finality to administration of estates. Where a tortfeasor is

deceased, these legitimate legislative purposes can be in obvious conflict. It thus becomes legitimate legislative purpose to strike a balance between these conflicting goals. In effecting a balance, the South Carolina legislature has recognized that tangible, transferable estate assets are quite different from the benefits of a liability insurance policy. The legislative classification procedure protects inheritances of heirs and beneficiaries and permits them to give good title to properties. While innocent tort victims may consider it unjust to preclude such inheritances from being reached, it is a legitimate legislative function to make such policy decisions. It is entirely reasonable and rational to effect a different balance when a decedent tortfeasor had liability insurance coverage, since there is then the

opportunity to compensate innocent tort victims without jeopardizing inheritances and orderly administration of estate assets. The only asset sought to be reached, i.e., the liability insurance policy, has not been distributed and there is therefore no policy consideration to compete against the legitimate legislative purpose of allowing the claims of injured parties asserted within the statute of limitations.

No injustice occurs with respect to the insurance company for it is merely required to provide the insurance benefits for which a premium was paid. Indeed, if there were no liability insurance exception to the nonclaims statute, the liability insurance company would in effect receive a windfall profit from an abbreviated statute of limitations whenever its insured should fortuitously die soon enough after

committing a tort. Therefore, the challenged legislative classification rests upon a reasonable basis and is rationally related to legitimate purposes. Similarly situated tortfeasors are treated equally since a claim against liability insurance may be asserted whether the tortfeasor is subsequently deceased or merely terminated his insurance coverage after the time of the alleged tort.

Petitioners contend that the South Carolina Supreme Court's reasoning in its opinion in this case is imperfect because it focuses on protecting distributed assets while the exception to the nonclaims statute is not undistributed assets <u>per se</u> but liability insurance proceeds only. Petitioners' point misses the mark, because even if some estates contain undistributed assets other than liability insurance, there is not evidence of such in the case

at bar. If the standard for judicial review were to require that statutory classifications be perfect, then it is debatable that the liability insurance exception might be subject to improvement by enlarging it to cover all undistributed assets. Significantly, however, it is not the function of the courts in an equal protection review to impose on the states their own view of alternative classifications which might represent some improvement. See Schweiker, Ohio Bureau of Employment Services, and Caban, supra. The constitutional requirement is not perfection; the legislative scheme passes constitutional scrutiny if it reasonably and rationally advances a legitimate governmental objective. Id.; see also Hodel, supra. That the state may have furthered its underlying purpose more artfully, more directly, or more

completely, does not warrant a conclusion that the method it chose is unconstitutional. Hughes vs. Alexandria Scrap Corp., 426 U.S. 794 (1976).

Petitioners' Brief erroneously contends that in no other way does the tort law of South Carolina contemplate differing results depending on whether or not there exists liability insurance coverage. To the contrary, many cases have placed significance on the presence or absence of liability insurance. In the case of Brown vs. Anderson County Hospital System, 268 S.C. 479, 234 S.E. 2d 873 (1977), after partially abrogating the charitable immunity doctrine with respect to hospitals, the court expressly stated the abrogation would be applied prospectively only, to allow affected hospitals an opportunity to purchase liability insurance. Similarly, in the case of Elam

vs. Elam, 725 SC 132, 268 S.E.2d 109 (1980), the court held that liability insurance "is a relevant factor to be considered by this court in evaluating the continued vitality" of the parental immunity doctrine; and the court in Elam went on to abolish that doctrine. The case of Powers vs. Temple, 250 S.C. 149, 156 S.E. 2d 759 (1967) cited by the Petitioners, holds that the issue of insurance availability should not be improperly injected into a jury trial, but that case also recognizes that the judge has a duty to take into account the availability of insurance coverage and a recovery from joint tortfeasors and adjust the jury's verdict accordingly.

Petitioners can find no solace in the case of Lindsey vs. Normet, 405 U.S. 56 (1972). That Oregon case involved a constitutional challenge to a statute which

required tenants challenging eviction proceedings to post a bond of twice the amount of rent expected to accrue pending appellate review. The bond was forfeitable to the landlord if the appeal failed. The court recognized that the bond requirement erected a "substantial barrier to appeal faced by no other civil litigant in Oregon;" and concluded that the requirement bore "no reasonable relationship to any valid state objective" and thus unconstitutionally discriminated against the class of tenants appealing from adverse decisions. In contrast, in the case at bar Petitioners are not complaining of a denial of access to courts; they are attempting to add to the denial of access. They want to deny Respondent access to the courts for a hearing on the merits of his claim. Petitioners seem to be contending that the South Carolina nonclaims statute unfairly

prevents injured parties from bringing claims against estates of uninsured tortfeasors, but if that is the ill, the remedy is greater access not more restrictions on access.

Similarly, Petitioners' reliance on Logan vs. Zimmerman Brush Co., 455 U.S. 422 (1982) is misplaced. Logan is a case involving alleged employment discrimination against the handicapped. The challenged statute afforded the Illinois state regulatory commission 120 days within which to convene a fact-finding conference. It held such a conference on the 125th day. The claimant had filed his claim in a timely fashion, but the commission failed to meet within the time limits established by statute. The Illinois Supreme Court held that the 120-day period was jurisdictional and the claim was barred. This Court properly struck down the

challenged statute, some justices relying on equal protection grounds and others on due process grounds. The statute was found to have erected an arbitrary and unreasonable procedural barrier to the resolution of the claim. The Respondent Arthur Fleming also seeks a resolution on the merits of his claim. Petitioners are not interested in protecting the fundamental right of access to courts for adjudication of disputes. They are trying to add to the denial of access.

Petitioners claim that the liability insurance exception to South Carolina's nonclaims statute creates a lottery, and that Respondent is a lucky winner. If Respondent should successfully recover Aetna's liability insurance coverage as partial compensation for his son's catastrophic injuries, that hardly makes him lucky. How lucky can one be to sustain

catastrophic brain injuries as the result of another's negligence? It represents gross misfortune for any party to sustain catastrophic injuries due to the negligence of another. The misfortune would be compounded if the negligent tortfeasor is immune from suit, thus depriving the injured party of his claim to just compensation. If Petitioners' concern is genuinely for those unfortunate victims who cannot assert their claims because they are dealing with the estate of an uninsured tortfeasor, the way to eliminate such a result is to allow those victims' claims also, not to deny access to the courts of other injured parties whose claims are against the estates of insured tortfeasors. It is suggested that what Petitioners really want is for Aetna to reap the windfall profit of avoiding their obligations due to the fortuity of their

insured's unexpected early death. If Aetna is forced to defend the claim on its merits, that hardly makes Aetna an unlucky loser, since Aetna is required to do no more than live up to its bargain to provide liability insurance coverage.

Supreme Court Rule 10 contemplates that a petition for Writ of Certiorari will be granted only where there are special and important reasons therefor. Petitioners have not made a showing that the Supreme Court of South Carolina has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. Petitioners have made no showing that the Supreme Court of South Carolina has decided an important question of federal law which has not been, but which should be, settled by this court. Petitioners have made no showing that the

South Carolina Supreme Court has decided a federal question in a way that conflicts with any applicable decision of this court.

This case involves no fundamental right and no suspect class. The challenged statute furthers a legislative objective in a reasonable manner, and is in accord with that of other states. See, e.g., In Re: Miles Estate, supra.; In Re: Estate of Daigle, 634 P. 2d 71 (Colo. 1981).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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